Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1238

CAPTAIN W. F. FREDEMAN, PRESIDENT OF PORT ARTHUR TOWING COMPANY AND PALMER MIDSTREAM SERVICES, INC.,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Regulations Involved	3
Statement of the Case	4
Reasons for Granting the Writ	
I. The case presents a constitutional question of substantial importance that has not been expressly decided by this Court	6
II. The decision of the Temporary Emergency Court of Appeals is in glaring conflict with decisions of this Court and of the Courts of Appeals of other circuits	7
III. The Temporary Emergency Court of Appeals in foreclosing questions which were not and could not have been before it, has strayed widely from the usual course of judicial proceedings and accordingly this Court should exercise its power of supervision	10
Conclusion	11
Appendix	
A—Opinion of the Court Below	13
B—Order of District Court	15
C—*United States of America v. Empire Gas Corporation*	18
D—Order Denying Rehearing	39
Certificate of Service	40

LIST OF AUTHORITIES

CONSTITUTION OF THE UNITED STATES

Amendment V	2, 3, 6, 7

STATUTES

28 U.S.C. § 1254(1)	2
Economic Stablization Act of 1970 §211(g)	2
12 U.S.C. § 1904 (note)	2

	Page
REGULATIONS	
10 C.F.R. §210.35(b)	3, 9
10 C.F.R. Part 211	
10 C.F.R. §211.1(a)	3
10 C.F.R. Part 212	
10 C.F.R. § 212.1(a)	3

CASES	Page
Federal Communication Commission v. Pottsville Broadcasting Company, 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940)	11
Illinois Bell Tele. Company v. Slattery, 102 F.2d 58 (7th Cir. 1939) cert. denied, 307 U.S. 648, 59 S.Ct. 1045, 83 L.Ed. 1527	11
Ohio Oil Co. v. Thompson, 120 F.2d 831 (8th Cir. 1941)	11
Oklahoma Press Publishing Company v. Walling, 327 U.S. 186, 90 L.Ed. 614 (1945)	6, 7, 8, 10
Reisman v. Caplan, 375 U.S. 440, 11 L.Ed.2d 159, 84 S.Ct. 508 (1964)	6, 7, 8, 10
Tasty Baking Company v. Cost of Living Council, 529 F.2d 1005 (T.E.C.A.)	8
United States v. Newman, 441 F.2d 165 (5th Cir. 1971)	10
United States of America, et al v. Empire Gas Corporation, et al (T.E.C.A. No. 8-3, December 8, 1976)	9
United States v. Powell, 379 U.S. 48, 13 L.Ed.2d 112, 85 S.Ct. 508 (1964)	6, 7, 8, 10
United States v. State of California, 504 F.2d 750 (T.E. C.A., 1974)	8

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NO. _____

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Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Captain W. F. Fredeman, Appellee in the Court below, prays that a Writ of Certiorari issue to review the judgment of the Temporary Emergency Court of Appeals entered in this cause on January 3, 1977, reversing the judgment of the United States District Court for the Eastern District of Texas (Beaumont Division) entered September 8, 1976.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals is not reported. The Court held *per curiam* that

the instant case was controlled by *United States of America, et al v. Empire Gas Corporation, et al* (T.E.C.A. No. 8-3, December 8, 1976). The District Court entered an order without opinion in this case. The opinion of the Temporary Emergency Court of Appeals is printed in Appendix A hereto. The Order of the District Court is printed in Appendix B hereto. The unofficial report of *United States of America, et al v. Empire Gas Corporation, et al,* as appears in CCH Federal Energy Guidelines Vol. 3, ¶ 26,065, is printed in Appendix C hereto.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered January 3, 1977. Petitioner's Motion for Rehearing, and alternatively, for Modification of the Judgment and Order, was denied on February 4, 1977. The Court's Order denying Rehearing is printed in Appendix D hereto. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254 (1), and the Economic Stabilization Act of 1970 § 211(g), 12 U.S.C. § 1904 (note).

QUESTIONS PRESENTED

(1) Whether the Fifth Amendment's prohibition against deprivation of liberty and property without due process of law applies to coercive enforcement of administrative subpoenas?

(2) Whether an administrative subpoena is "lawful and proper" if it has absolutely no relevance to a pending regulatory matter?

(3) Whether the Court of Appeals can properly rule on the sufficiency of evidence which a party has had no opportunity to present?

(4) Whether the Court of Appeals can usurp the jurisdiction of the lower court on remand by foreclosing questions not before the Court on appeal?

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V

> "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

REGULATIONS

10 C.F.R. § 210.35(b)

"No. 2 heating oil and No. 2-0 diesel fuel are exempt from the provisions of Part 211 and Part 212 of this chapter."

10 C.F.R. Part 211 (as pertinent)

> 10 C.F.R. § 211.1 (a) "*General.* This part applies to the mandatory allocation of crude oil, residual fuel oil and refined petroleum products produced in or imported into the United States."

10 C.F.R. Part 212 (as pertinent)

> 10 C.F.R. § 212.1(a) *Scope.* "This part sets forth the price rules for firms engaged in the production and sale of covered products . . . ."

STATEMENT OF THE CASE

Petitioner, Captain W. F. Fredeman, is President of Port Arthur Towing Company (Patco) and its wholly-owned subsidiary, Palmer Midstream Services, Inc. (Palmer). Palmer served as the conduit through which Patco sold a quantity of No. 2-D diesel fuel to Varibus Corporation (Varibus), a wholly owned subsidiary of Gulf States Utilities Company. No. 2-D diesel is currently not subject to any price or allocation regulations of the Federal Energy Administration (FEA).

In May of 1975, representatives of the FEA requested Patco to produce various records relating to the Varibus sale. Patco complied with this request. In November of 1975, the FEA issued a Notice of Probable Violation to Patco and Palmer, alleging that the Varibus sale of January, 1974, violated pricing and other regulations of the FEA. Representatives from the FEA and Patco met several times subsequent to the Notice to discuss its merits. As a result of these meetings, and failing agreement on the validity of the alleged violation, the FEA issued a series of subpoenas, the last dated April 2, 1976, which demanded various financial records from August, 1972 to March, 1976.

With each subpoena Patco and Palmer duly filed a Motion to Quash or Modify. Patco and Palmer contended that production of this massive volume of records was unnecessarily burdensome, irrelevant to any legitimate issue, in bad faith and harassing, and that the subpoena was arbitrary and onerous in other respects. A series of negotiations culminated in an agreement between the parties on April 15, 1976, in which the FEA agreed to limit its demand to Patco and Palmer sales journals

during the period of January 1, 1973, to January 31, 1974. Since the subpoena of April 2, was still outstanding, counsel for the summoned parties duly filed a Motion to Quash or Modify along with a confirmation that any outstanding subpoena would be modified to effect the terms of agreement. This motion was filed on April 15, 1976, the same date as the aforementioned agreement.

On April 16, 1976, the FEA executed a complete about face. A "Modified Subpoena" was issued, to be sure, but its terms blatantly contravened the settlement agreement reached only one day earlier. The breadth of the subpoena was greatly expanded, but the compliance date was unchanged. Patco and Palmer were obligated to file a Motion to Quash or Modify. The FEA denied the motion. An appeal was taken to the FEA Office of Exceptions and Appeals, and it was dismissed on June 14, 1976.

On August 16, 1976, a Show Cause hearing relating to the enforceability of the April 16 subpoena was brought by the FEA before the Honorable William M. Steger in the United States District Court for the Eastern District of Texas (Beaumont Division). Patco and Palmer pleaded, *inter alia,* that the subpoena was unreasonably burdensome, issued in bad faith, and was vexatious and harrassing. The Court entertained the argument of counsel for both parties, and summarily, without an evidentiary hearing, ordered that the April 16 subpoena be modified to reflect the April 15, agreement. (Appendix B)

The FEA appealed the District Court's Order to the Temporary Emergency Court of Appeals (T.E.C.A.). On January 3, 1977, that Court entered a *per curiam* opinion reversing the District Court's order. (Appendix

A) The T.E.C.A. held that the case was "controlled by the decision of this Court in *United States of America, et al v. Empire Gas Corporation, et al", supra.* (Appendix C) The judgment of the T.E.C.A. stated that "the district court's order . . . is reversed and remanded with directions to enforce Compliance with . . . (the April 16, 1976) . . . subpoena . . ." Petitioner's Motion for Rehearing and for Modification of Mandate was denied on February 4, 1977. (Appendix D) The T.E.C.A. has stayed its Mandate pending this Court's disposition of the case.

REASONS FOR GRANTING THE WRIT

I.

The case presents a constitutional question of substantial importance that has not been expressly decided by this Court.

The issue that is squarely presented by the facts and procedural history of this case is whether or not the Fifth Amendment applies to an administrative subpoena enforcement proceeding. This Honorable Court has repeatedly affirmed that certain defenses are available to a summoned party in an administrative subpoena enforcement proceeding. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 90 L.Ed. 614 (1945) (harassment and unreasonable overbreadth); *United States v. Powell,* 379 U.S. 48, 13 L.Ed.2d 112, 85 S.Ct. 248 (1964) (harassment and a motive of bad faith); and *Reisman v. Caplan* 375 U.S. 440, 11 L.Ed.2d 159, 84 S.Ct. 508 (1964) ("any appropriate ground"). Furthermore, this Court has held that the summoned party is

entitled to a meaningful adversary hearing. *United States v. Powell, supra,* 379 U.S. at p. 57. These holdings require that the hearing be consistent with the standards of procedural due process. The effect of the T.E.C.A.'s holding in this case is to deny Petitioner, the summoned party, any evidentiary hearing or opportunity to introduce evidence and cross examine witnesses.

The District Court's ruling in favor of Petitioner was summarily entered after hearing argument of counsel and without hearing any evidence. While Petitioner was obviously not aggrieved or prejudiced by this action, the T.E.C.A.'s reversal and rendition of judgment in favor of the FEA has the effect of denying to Petitioner any rights to support his defenses with evidence. By ignoring the due process requirements implicit in *United States v. Powell, Oklahoma Press Publishing Co. v. Walling,* and *Reisman v. Caplan, supra* and effectively holding that the hearing before the District Court was an unnecessary formality, the T.E.C.A. has sanctioned a startling advance towards a system of government where administrative agencies rule, intrude, and harass by arbitrary fiat. It is, *a fortiori,* a serious erosion of the guarantees of the Fifth Amendment.

II.

The decision of the Temporary Emergency Court of Appeals is in glaring conflict with decisions of this Court and of the Courts of Appeals of other circuits.

As pointed out in Part I, *supra,* the Temporary Emergency Court of Appeals decided this case in contravention of a series of Supreme Court cases, including *United States v. Powell, Oklahoma Press Publishing Co. v. Wall-*

ing and *Reisman v. Caplan, supra.* Moreover, the T.E.C.A. also chose to ignore the guidance of the Courts of Appeals of several circuits on significant questions of law.

The Fifth Circuit has held that if, for example, a taxpayer raises the *Powell, Oklahoma* and *Reisman* series of defenses "in a substantial way", the District Court must provide an evidentiary hearing to inquire into a possible abuse of the Court's process. *United States v. Newman* 441 F.2d 165 (5th Cir. 1971). Here, Petitioner raised these issues so substantially through pleadings and argument that the District Court summarily modified the governmental subpoena. Certainly Petitioner should have the opportunity to underscore with evidence those points which it raised so substantially in the lower Court.

The T.E.C.A. also ignored its own holding in prior cases in reversing the District Court's Order, in the present case. In *Tasty Baking Company v. Cost of Living Council,* 529 F.2d 1005 (T.E.C.A.) this same appellate court refused to enforce compliance with orders which were wholly invalid due to the failure to comply with certain notice requirements upon their promulgation. Also, in *United States v. State of California,* 504 F.2d 750 (T.E.C.A., 1974) the T.E.C.A. refused to allow new enforcement proceedings to be initiated after the expiration of regulatory controls. In these two cases the T.E.C.A. clearly recognized that enforcement is not proper if it has no relation to a validly pending regulatory matter. Yet the same Court refused to apply the same principle in a case in which the circumstances are strikingly similar. The statutory authorization for controls regulating No. 2-D diesel fuel, the subject of the Varibus

sale, have expired. 10 C.F.R. § 210.35(b) The FEA is without authority to institute enforcement proceedings based upon information which does not relate to the Varibus sale, and discovery of that information is clearly irrelevant to any lawfully authorized purpose. To be consistent with its own prior holdings, the T.E.C.A. should not have summarily enforced the subpoenas in this case.

The T.E.C.A. justified its *per curiam* reversal and rendition on the grounds that its decision of *United States of America v. Empire Gas Corporation* governed the instant case. (The opinion is printed as Appendix C). However, a comparison between the facts of that case and the present one reveals no similarity whatsoever.

In *Empire Gas,* the summoned party opposed enforcement of a subpoena on the grounds that the FEA's authority had expired, that the subject regulations were unconstitutional, and that the subpoenaed material had already been revealed to the agency. Only this last element is common in this case, and it is submitted here as only one of several factors which form a pattern of governmental bad faith, harassment, and other forms of conduct calculated to effect an abuse of judiciary process.

Empire Gas does not "govern", or even remotely relate to this case. What this case presents is a question of due process requirements, as suggested in the series of Supreme Court cases cited previously. With all due respect, Petitioner submits that the T.E.C.A. failed to recognize and apply the proper standards for determining the enforceability of an administrative subpoena. As defined by this Court's decisions there are two separate and distinct

inquiries involved. Initially, it must be determined that the subpoena is lawfully authorized and proper in all respects. *United States v. Powell, supra,* 379 U.S. at 57. Even if this first requirement is satisfied, a summoned party is entitled to raise a defense, based upon the right of private citizens to be free from "officious examination". *Oklahoma v. Walling, supra,* 327 U.S. at p. 2, 3. When this defense is raised in a substantial way, the district court should conduct an inquiry into the existence of an effort to abuse its process. *United States v. Newman, supra,* at p. 170. The holding of the Temporary Emergency Court of Appeals in this case foreclosed any possibility of such an inquiry. This Court should grant certiorari to reaffirm the validity of its prior holdings.

III.

The Temporary Emergency Court of Appeals, in foreclosing questions which were not and could not have been before it, has strayed widely from the usual course of judicial proceedings and accordingly this Court should exercise its power of supervision.

As noted previously, the T.E.C.A. directed the District Court in this case to "enforce compliance with the subpoena." The terms of this order admit no latitude to the District Court to conduct an evidentiary hearing into the issues raised by Petitioner's affirmative defenses. Thus the T.E.C.A. has made one of two decisions, both of which are improper. The court either exceeded its authority and decided that the *Powell-Oklahoma-Reisman* defenses are no longer viable, or, the Court has determined that Petitioner's evidence is inadequate to sustain the defenses asserted. This is clearly improper since the

Court has no idea what evidence Petitioner will offer. The hearing before the District Court was summary in nature, and therefore no evidence was presented. Accordingly, the T.E.C.A. had no basis on appeal upon which to judge the sufficiency of the evidence.

A District Court's discretion on remand is properly foreclosed *only* as to those questions raised on appeal. *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940). When a new and different question arises which has not (or could not have) been considered by the appellate court, the lower court is not foreclosed by lack of jurisdiction to give it consideration on remand. *Illinois Bell Tel. Co. v. Slattery,* 102 F.2d 58 (7th Cir. 1939) cert. denied, 307 U.S. 648, 59 S.Ct. 1045, 83 L.Ed. 1527. Upon remand, the district court is free to decide all issues not within the compass of the mandate. *Ohio Oil Co. v. Thompson,* 120 F.2d 831 (8th Cir. 1941)

In this case the District Court considered pleadings and argument adequate to support Petitioner's defenses. Even if the T.E.C.A. disagrees, it should not foreclose the offer of evidence. Its overzealous directive is a substantial deviation from accepted judicial procedure. This Court should exercise its supervisory power to correct this departure.

CONCLUSION

Petitioner in this case has been aggrieved by a decision of a federal appellate court effecting a denial of due process, ignoring well settled Supreme Court authority, and invading the original jurisdiction of the District Court. Petitioner prays that a writ of certiorari issue to protect

his rights, the District Court's process, and the integrity of Well ordered judicial procedure.

Respectfully submitted,

By _____

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Captain W. F. Fredeman,
President of Port Arthur Towing
Company and Palmer Midstream
Services, Inc.

Of Counsel:

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APPENDIX A

IN THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

NO. 5-19

THE UNITED STATES OF AMERICA,

Petitioner-Appellant

v.

CAPTAIN W. F. FREDEMAN, PRESIDENT OF PORT ARTHUR TOWING COMPANY AND PALMER MIDSTREAM SERVICES, INC.,

Respondents-Appellees

Appeal from the United States District Court for the Eastern District of Texas

(B-76-261-CA)

Barrie L. Goldstein, Department of Justice, Washington, D. C., with whom Rex E. Lee, Assistant Attorney General and Stanley D. Rose, were on the brief for the Appellant.

W. Garney Griggs, Ross, Griggs & Harrison, Houston, Texas, was on the brief for the Appellees.

Before CHRISTENSEN, ESTES and JAMESON, Judges. Per curiam.

This appeal is controlled by the decision of this court in *United States, et al. v. Empire Gas Corporation, et al.*, TECA No. 8-3, decided December 8, 1976. The Federal

Energy Administration subpoena of April 16, 1976, in controversy was issued for a lawfully authorized purpose, is in all respects lawful and proper and should be enforced. Accordingly, the district court's order of September 9, 1976, appealed from is reversed and remanded with directions to enforce compliance with the Federal Energy Administration subpoena in controversy.

SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C.A. NO. B-76-261-CA

UNITED STATES OF AMERICA

v.

CAPT. W. F. FREDEMAN, PRES. PORT ARTHUR TOWING COMPANY AND PALMER MIDSTREAM SERVICES INC.

O R D E R

BE IT REMEMBERED, that on the 16th day of August, 1976, came on for hearing the application of Petitioner, United States of America, for and on behalf of the Federal Energy Administration for an Order to compel compliance with a subpoena issued April 15, 1976, by the Federal Energy Administration directed to Respondent, Captain W. F. Fredeman, President of Port Arthur Towing Company and its subsidiary, Palmer Midstream Services, Inc., who, pursuant to an Order to Show Cause duly entered by this Court on July 23, 1976, appeared herein to show cause why such subpoena of April 15, 1976, issued by the Federal Energy Administration should not be complied with; and the Court having considered the pleadings of Petitioner and Respondent, including the subpoena of April 15, 1976 and having heard arguments of counsel and duly considering same, is of the opinion that the subpoena of April 15, 1976, issued by the Federal Energy Administration to Respondent, Captain

W. F. Fredeman, President of Port Arthur Towing Company and its subsidiary, Palmer Midstream Services, Inc., should be quashed and held for naught, in that such subpoena is overbroad, arbitrary and seeks documents beyond the scope of any legitimate inquiry, and that such documents are irrelevant to any material issue or to any lawful purpose, and seeks to compel production of documents that do not lead to the examination of records material and relevant to any lawful issue or purpose, and the Court, being of the further opinion that such subpoena should in all things be restricted and modified, it is therefore,

ORDERED, ADJUDGED and DECREED that the subpoena issued April 15, 1976, by the Federal Energy Administration to Respondent, Captain W. F. Fredeman, President of Port Arthur Towing Company and its subsidiary, Palmer Midstream Services, Inc., as issued, be quashed and held for naught, except insofar as modified by this Order, and it is further

ORDERED that the said subpoena of April 15, 1976, be modified so as to require Respondent to produce and make available for reasonable inspection by Petitioner, the Sales Journals of Port Arthur Towing Company and its subsidiary, Palmer Midstream Services, Inc., for the period of January 1, 1973, through January 31, 1974, and it is further

ORDERED that such documents as shall be produced pursuant to this Order shall be made available to Petitioner in the offices of Ross, Griggs & Harrison, 927 Chamber of Commerce Bldg., Houston, Texas, on the 21st day of September, 1976, at 10 o'clock a.m., and it is further

ORDERED that all relief not specifically granted herein is denied.

ENTERED at Beaumont, Texas, this 8th day of September, 1976.

/s/ WILLIAM M. STIGER
William M. Stiger
United States District Judge

APPENDIX C

COURT DECISIONS

¶ 26,065 USA v Empire Gas Corporation

United States of America, et al. v. Empire Gas Corporation, et al., U. S. Temporary Emergency Court of Appeals, Dkt. No. 8-3, December 8, 1976.

Before Christensen, Ingraham, and Estes, Judges.

Economic Stabilization Act of 1970

Emergency Petroleum Allocation Act of 1973

Federal Energy Administration Act of 1974

Subject: FEA Subpoena Powers

Facts and arguments.—The Federal Energy Administration sought to obtain various documents and records from Empire Gas Corporation, and the agency obtained subpoenas for the material. Empire refused to honor the subpoenas, and FEA brought suit to force the company to produce the desired material. Empire, in presenting its defense before a federal district court (¶ 26,061), argued that FEA's regulations were unconstitutional and arbitrary. On appeal from the lower court's ruling that the regulations are neither unconstitutional nor arbitrary, Empire again challenged the applicable regulations and further alleged that the District court erred by not limiting the scope of the subpoenas to information that had not previously been submitted, and that the power of the subpoenas lapsed with the expiration of the Federal Energy Administration Act.

TECA opinion.—In affirming the district court's opinion, TECA said that FEA's regulations have been

previously judicially determined not to be arbitrary, and that their application in the instant case could not even be determined until the information wanted by the agency was obtained. On the firm's contention that FEA subpoenaed material which had already been provided, TECA said administrative subpoenas should be enforced if the information sought is relevant, it was relevant, and the firm did not demonstrate that it would be an unnecessary burden to comply with the FEA orders. As for the temporary lapse of the FEA Act, the court noted that the expiration of a statute does not preclude enforcement of past violations, and that Congress intended that FEA continue its functions in an uninterrupted manner notwithstanding the hiatus in the Act.

The text of the TECA opinion follows.

ESTES, Judge: This is an appeal from an August 9, 1976 order of the District Court for the Western District of Missouri enforcing 61 subpoenas issued by the Federal Energy Administration (FEA) to a retail marketer of propane, Empire Gas Corporation (Empire), and 60 of its subsidiaries (appellants). Empire and its approximately 300 subsidiaries are subject to FEA's Mandatory Petroleum Allocation and Price Regulations, 10 C. F. R. Parts 210, 211 and 212.

The FEA began an audit of appellants' books and records in October, 1974, to determine whether there was compliance with FEA's regulations during the period February through October, 1974. On or about January 15, 1975, the audit was suspended at the requests of appellants. In order to obtain documents and information for completion of the pending audit, the FEA issued to Empire and its subsidiaries the 61 subpoenas, the enforcement of which is at issue here.

In the interim between the initial audit and the subsequent issuance of the present subpoenas, Empire submitted, on September 2, 1975, to the General Counsel of FEA a Request for Interpretation of 10 C. F. R. Part 212, Subpart F, regarding the meaning of the FEA pricing regulations affecting its sales [designated Record on Appeal (D.R.) at 232]. On May 28, 1976, the FEA issued an interpretation to Empire "which does not support Empire's position," and Empire appealed that interpretation (D.R. 241). On October 1, 1976, the appeal was denied.

In October, 1975, the FEA issued subpoenas directing the appellants to appear, testify, and produce various books, records, and documents relating to the prices charged by appellants. Pursuant to 10 C. F. R. § 205(h)(1), Empire filed with FEA a motion to quash or suspend the above-mentioned subpoenas, which motion was denied. Appellants continued to refuse to comply with the subpoenas.

On January 29, 1976, the United States of America brought this action on behalf of the FEA for enforcement of the subpoenas.

On August 9, 1976, the district court found that the subpoenas were enforceable; denied appellants' motion to certify constitutional issues to this court pursuant to § 211(c) of the Economic Stabilization Act of 1970, as amended, 12 U. S. C. § 1904 note (ESA), as incorporated by reference in § 5(a) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U. S. C. 751, *et seq.* (EPAA); and ordered the appellants to appear and give testimony before the appellees. The court further ordered that the appellants "make available for

inspection and copying at the headquarters of Empire Gas Corporation all documents, records, and materials required by the subpoenas." (D. R. at 263).

On August 13, 1976, the appellants filed motions, *inter alia*, requesting a stay of the district court order of August 9, 1976; and on September 1, 1976, appellants filed a Motion to Modify the Court's Order enforcing the administrative subpoenas. On September 3, 1976, the court denied appellants' August 13 motions and, without ruling on the Motion to Modify, ordered the appellants to comply with the subpoenas by September 18, 1976. This court granted the stay on September 22, 1976.

The appellants base their resistance to enforcement of the subpoenas on three contentions: (1) that the subpoenas were issued to determine compliance with FEA regulations, 10 C. F. R. Parts 210, 211 and 212, which regulations are arbitrary, vague, and unconstitutional; (2) that the district court erred in not modifying the scope of the subpoenas to preclude reexamination by the FEA of records previously made available to the FEA; and (3) that the transfer of functions from the FEA, its administrator, officers and agents, to the Federal Energy Office (FEO), its administrator, officers and agents, was invalid, unauthorized, and unconstitutional, resulting in the expiration of the authorization for the subpoenas and, hence, termination of this subpoena enforcement action.

Laws, Regulations and Rulings Involved

The pertinent provisions of the statutes and regulations and FEA rulings involved are summarized, as follows:

A. *Statutory Provisions Involved*

Two statutes, the EPAA and the Federal Energy Administration Act of 1974, 15 U. S. C. 762, *et seq.* (FEAA), authorize the FEA to obtain data and information from parties subject to regulations issued pursuant to their mandates.[1]

Sections 13(b) and (e) of the FEAA, 15 U. S. C. 772(b) and (e), specifically authorize the Administrator of the FEA to collect information and to issue subpoenas to compel the appearance of witnesses or the production of documents and records:

> § 13(b), 15 U. S. C. 772(b)—All persons owning or operating facilities or business premises who are engaged in any phase of energy supply or major energy consumption *shall make available to the Administrator* such information and periodic reports, records, documents, and other data, relating to the purposes of this Act, including full identification of all data and projections as to source, time, and methodology of development, as the Administrator may prescribe by regulation or orders as necessary or appropriate for the proper exercise of functions under this Act.
>
> § 13(e)(1), 15 U. S. C. 772(e)— The administrator, or any of his duly authorized agents, *shall have the power to require by subpoena the attendance and testimony of witnesses, and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the Administrator is authorized to obtain pursuant to this section.* [Emphasis added.]

1. The procedures for implementing FEA's statutory authority to collect data and information by subpoena are set forth in FEA's procedural regulations at 10 C.F.R. 205.8.

Section 13(e)(2) of the FEAA, 15 U. S. C. 722(e)(2), also provides that the agency may seek judicial enforcement of its subpoenas in any appropriate United States district court:

> (2) Any appropriate United States district court may, in case of contumacy or refusal to obey a subpoena issued pursuant to this section, issue an order requiring the party to whom such subpoena is directed to appear before the Administration and to give testimony touching on the matter in question, or to produce any matter described in paragraph (1) of this subsection, and any failure to obey such order of this court may be punished by such court as a contempt thereof.

Similarly, the EPAA provides authority to issue subpoenas and to obtain judicial enforcement thereof. Section 5(a)(1) of the EPAA incorporates by reference Section 206 of the ESA, 12 U.S.C. § 1904 note, which states:

> The head of an agency exercising authority under this title, or his duly authorized agent, shall have authority, for any purpose related to this title, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers and other documents, and to administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of refusal to obey a subpoena served upon any person under the provisions of this section, the head of the agency authorizing such subpoenas, or his delegate, may request the Attorney General to seek the aid of the district court of the United States for any district in which such person is found to compel such person,

after notice, to appear and give testimony, or to appear and produce documents before the agency.

B. *FEA Pricing Regulations*

The present petroleum pricing regulations of the FEA originated from the mandatory petroleum pricing program of the Cost of Living Council (CLC) and were established during Phase IV of the Economic Stabilization Program. In January, 1974, the FEA, pursuant to Executive Order 11748, 38 F. R. 33575 (December 6, 1973), adopted without substantial change the CLC's Phase IV price regulations respecting crude oil and petroleum products. 39 F. R. 1924, *et seq.* (January 15, 1974). Section 212.93 of the original FEA price regulations was derived from § 150.359 of the CLC regulations and sets forth the price rule governing sales of petroleum products, including propane, by resellers and retailers like Empire and its subsidiaries.

The original § 212.93 of the FEA's regulations required that the maximum lawful price for a covered product be determined by taking the weighted average price at which the seller firm lawfully priced the covered product in transactions with the *class of purchaser* involved on May 15, 1973, and adding an amount which reflected, on a dollar-for-dollar basis, any *increased product costs* which the firm had incurred since that date. 10 C. F. R. § 212.93(a). These increased product costs were required to be spread equally across all of that product which the firm had in inventory and applied equally to all purchasers for the purpose of determining the seller's maximum lawful selling price. Increased product costs which a firm was unable to pass through to its customers in a given month could be accumulated (or "banked")

and passed through in future months. 10 C. F. R. §212.93 (e). Also, the selling price could be increased to reflect certain nonproduct cost increases of the seller. 10 C. F. R. §212.93(b).

Since January 15, 1974, § 212.93 has been amended several times. For example, in April, 1974, FEA amended § 212.93(b) to permit retailers like Empire to increase the selling prices for propane in order to reflect certain non-product cost increases. 39 F. R. 12019 (April 2, 1974). Furthermore, in November, 1974, FEA established a 10 percent limit on the amount of "banked costs" which may be used for price increases in a single month. 39 F. R. 39259 (November 6, 1974). In addition, FEA implemented a change in December, 1974, in the pricing of propane by permitting unequal application among classes of purchasers of increased product costs.

C. *FEA Ruling*

On March 7, 1975, FEA issued Ruling 1975-2, 3 CCH *Energy Management* ¶ 16.042, entitled "Application of the Term 'Class of Purchaser' under FEA Petroleum Price Regulations," 40 F. R. 10655. Ruling 1975-2 interprets the manner in which the class of purchaser doctrine, initially established by the CLC and carried forward by the FEA, is to be applied. Under this ruling, the doctrine applies to all sales of covered products by resellers, like Empire, whose price must be based on the prices they charged various classes of purchasers for a particular product on May 15, 1973.[2]

2. "By way of explanation and numerous examples, FEA's Ruling 1975-2 provided extensive and necessary clarification of the application of the CLC/FEA class of purchaser doctrine to the myriad transactions which can arise in the sale of crude oil and petroleum

I. The District Court Properly Enforced the Subpoenas Issued to Determine Compliance with the FEA's Mandatory Allocation and Pricing Regulations.

A. The appellants' contention that the FEA pricing and allocation regulations contained in 10 C. F. R. Parts 210, 211, and 212 for the pricing and allocation of crude oil and refined petroleum products, including propane, are unconstitutional because they are arbitrary, vague and ambiguous does not constitute a valid defense in this subpoena enforcement proceeding. At page 15 of their brief, appellants state:

> The crux of Appellants' objections is simple: application of the substantive regulations contained in 10 C. F. R. Parts 210, 211 and 212 is left to the arbitrary power of the FEA because there is no objective way, given the illusory definitions of "firm", "supplier", "retailer", etc. contained therein, of applying the price and allocation rules to complex business entities such as Empire and its subsidiaries.

Appellees correctly respond that appellants cannot resist enforcement of the subpoenas solely on the ground of alleged unconstitutionality of regulations which the appellees can not determine were violated until they have examined the subpoenaed information.

As the cases discussed below illustrate, a court need not determine that the regulatory scheme is valid and constitutional prior to issuing an order enforcing an agency subpoena.

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products. Consequently, the guidance contained in Ruling 1975-2 is applicable to sales made by Empire under the CLC/FEA regulations and the information which the FEA needs to complete its audit of Empire is in large measure determined by that Ruling." Appellees' (Government's) Brief, pp. 6-7.

In *Oklahoma Press Publishing Company v. Walling*, 327 U. S. 186, 66 S. Ct. 494 (1945), the Supreme Court rejected the petitioners' argument that the Administrator of the Wage and Hour Division of the Department of Labor could not enforce a subpoena without a prior adjudication that the act in question covered the petitioners' activities. The acceptance of the petitioners' contention "would stop much if not all of investigation at the threshold of inquiry. . . ." 327 U. S. at 213. The Court, in language now regarded as establishing the legal standard to be applied in subpoena enforcement proceedings, held that "[i]t is enough that the investigation be for a lawfully authorized purpose within the power of Congress to command." 327 U. S. at 209. In the instant case, the appellants have admitted that they are subject to the FEA's Mandatory Petroleum Allocation and Price Regulations. (Brief at 3.) Accordingly, the subpoenas were issued for a lawful purpose and are entitled to enforcement.

The validity of a subpoena issued by the Secretary of Labor in administrative proceedings under the Walsh-Healey Public Contracts Act was disputed in *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943). The corporation resisted enforcement of the subpoena based, *inter alia*, on the allegedly "arbitrary, artificial, unreasonable, discriminatory, and capricious" (317 U. S. at 507) nature of a ruling by Secretary Perkins that the Act applied to petitioner. The Court rejected the argument and held:

> Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or *irrelevant* to any lawful purpose of the Secretary in

> the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. The Secretary may take the same view of the evidence that the District Court did, or she may not. The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do. . . . [317 U. S. at 509, emphasis added]

The Supreme Court dismissed petitioner's assertions relating to "the meaning of the contract and the Act as implemented by administrative rulings in existence at the time of the making and performance of the contract. . ." (317 U. S. at 509 note 11), by stating:

> The petitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, *but they are not of a kind that can be accepted as a defense against the subpoena.* [Emphasis added; *id.*]

The similarity between the arguments appellants urge we accept and those rejected by the Supreme Court in *Endicott Johnson* is apparent. The district court correctly held that the "determination of the applicability or validity of agency regulations is not a condition precedent to enforcement of an agency subpoena. Indeed, to find otherwise would . . . permit regulated parties an end run attack upon regulations whenever they found themselves broken at the center." (D. R. 260-261)[3]

3. This is only the commencement of administrative procedures which must be exhausted prior to agency determination of violations of the Mandatory Allocation and Price Regulations. See *City of New York v. New York Telephone Co.*, 468 F.2d 1401, 1402 (TECA 1972).

In *Myers v. Bethlehem Corporation*, 303 U. S. 41, 58 S. Ct. 459 (1938), petitioner sought to enjoin the National Labor Relations Board from holding a hearing for the alleged reason that the Board lacked jurisdiction over it. The petitioner argued that it should not be subjected to a futile, expensive, and vexing hearing. As the district court noted below, the Supreme Court held that the petitioner's contention of irreparable damage was

> at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . . Obviously, the rule . . . cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact. [303 U. S. at 50.]

In fact, the only case cited by the appellants in which the subpoenas were held to be unenforceable was *Shasta Minerals & Chemical Co. v. Securities & Exchange Commission*, 328 F.2d 285 (10 Cir. 1964). The unrebutted affidavits which the Shasta appellants submitted to the district court described systematic persecution and harassment by the S. E. C. *Shasta* held that it was an appropriate exercise of judicial review, since the agency admitted the truth of the affidavits for purposes of a motion for summary judgment, to determine whether the S. E. C. was acting arbitrarily or outside the scope of its authority, 328 F.2d at 288. No element of harassment is present in this case, so *Shasta* is clearly distinguishable.

Section 307 of *Davis on Administrative Law,* cited by appellants (Brief p. 6), deals with the privilege against self-incrimination in subpoena enforcement proceedings, and it does not support the contention that it is a prerequisite to enforceability of these subpoenas that the regulatory scheme with which the appellants must comply be determined valid. Rather, it is stated in Section 307 that "a corporation . . . enjoy[s] no privilege against self incrimination and that [its] representatives similarly enjoy no privilege against self incrimination with respect to the records of the organization. . .," supported by *Wilson v. United States,* 221 U. S. 361, 31 S. Ct. 538, 55 L.Ed. 771 (1911). Justification for this rule is stated in *United States v. White,* 322 U. S. 694, at 701, 64 S. Ct. 1243, at 1252:

> Basically, the production of the records of any organization, whether it be incorporated or not arises out of the *inherent and necessary power of the federal and state governments to enforce their laws,* with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records. [Emphasis added.]

The appellants contend that enforcement of the subpoenas prior to a judicial determination of the validity of the FEA's Mandatory Allocation and Pricing Regulations will deny them effective relief. The substance of this contention is at page 19 of the appellants' brief:

> [They] anticipate that the appellees will respond to the above arguments by claiming that the objections are premature because no Notice of Probable Violation or Remedial Order has as yet been

> issued. However, no effective relief can be granted against the burden of complying with unconstitutional FEA subpoenas unless the constitutional issues are decided prior to compliance. The issues are clearly framed, the Appellants face immediate hardship, and the resolution of these issues will have sufficient immediate impact to satisfy any ripeness test posed by the court. No relief from the burden of the subpoenas can be granted to the Appellants if, after producing all their records for audit, it is determined that the regulations are invalid. Conversely, if the regulations are valid, no harm will inure to the FEA by being required to wait somewhat longer for the records, given that the information on the records themselves will not change. To defer the resolution of these issues is to deny the Appellants effective relief. Moreover, the Appellants are obligated to raise their constitutional objections at the earliest available stage lest the objections be waived.

This argument must be rejected. If the FEA determines that the appellants have violated the Mandatory Allocation and Price Regulations after examination of the subpoenaed information, the appellants will have an opportunity first to challenge those regulations in the administrative forum and later to seek judicial review.

The district court correctly stated: "It is, of course, significant that the applicability of the regulations to respondents cannot be determined until the information sought by subpoena is made available to the FEA investigators." (D. R. at 258-259.)

II. The District Court Properly Refused to Modify the Scope of the Subpoenas.

Appellants contend that the district court erred in not modifying the scope of the subpoenas to preclude re-

examination of documents and records previously made available in connection with the FEA audit commenced October 29, 1974. Administrative subpoenas should be enforced if the information sought is relevant. *United States v. Morton Salt,* 338 U. S. 632, 641-643 (1949); *Endicott Johnson v. Perkins, supra,* at 509; 1 Davis, *Administrative Law Treatise,* § 306, pp. 188-189 (1958). The information sought relates to the appellants' prices, costs, sales, purchases and receipts and is unquestionably relevant. The district court properly concluded (D. R. p. 259) that

> respondents' [appellants'] assertion of the burden inherent in providing the subpoenaed documents and the resulting interruption of Empire's business operations fails to demonstrate a deprivation of due process of law, particularly in view of petitioners' [appellees'] willingness to make inspection of the documents at Empire's headquarters and make copies of any materials necessary for completion of the audit. Thus, respondents have failed to raise a substantial constitutional issue sufficient to require certification to the Temporary Emergency Court of Appeals and this Court has jurisdiction to determine enforceability of the subpoenas. See *Delaware Valley Apartment House Owners Ass'n. v. United States,* 350 F. Supp. 1144, 1149-50 (E. D. Pa. 1973), aff'd 482 F.2d 1400 (TECA 1973).

Although the retail price reports of all appellants were made available in the course of the October 29, 1974, audit, the FEA focused only on the December part of the audit containing daily log sheets of 32 Empire subsidiaries. (Stipulation filed May 17, 1976; D. R. 199). Appellants maintain that this duplication of production of documents imposes an unnecessary burden, but they admit

in their brief at p. 25 that "no specific evidence is contained in the record as to the precise degree of overlap." Appellants have not shown that the information sought by the subpoenas is unnecessarily duplicative; and the contention that they should be modified is denied.

III. The Administrator of the FEA Had Authority for Issuance and Judicial Enforcement of the Subpoenas, Correctly Enforced by the District Court.

Appellants' assertion that the temporary expiration[4] of the FEAA on July 30, 1976, both rendered the subpoenas unauthorized and removed the authority of the FEA Administrator to continue the subpoena enforcement action must be denied for the reasons discussed below. First, the general saving statute, 1 U. S. C. 109,[5] is ap-

4. The FEAA, which provided for the existence of the FEA and its Administrator, expired on July 30, 1976. Due to the expiration, the President issued Executive Order No. 11930, 41 F.R. 32399 (August 3, 1976) on July 30, 1976, establishing a Federal Energy Office (FEO) within the Executive Office of the President. Pursuant to Section 6 of Executive Order 11930, the Administrator of the newly-created FEO was given all of the authority of the defunct Administrator of the FEA. That authority included the power vested in the President by the EPAA. See, Executive Order No. 11790, 31 F.R. 23185 (June 27, 1974). On August 14, 1976, the Energy Conservation and Production Act, P. L. 94-385, 2 CCH *Energy Management* ¶ 10,450, was signed as a law. Section 112(a) of the Energy Conservation and Production Act extends the FEAA through December 31, 1977, and Section 112(b) of the act provides that the extension should be effective as of July 30, 1976. As a result, the President terminated the FEO in Executive Order No. 11933, 41 F.R. 36641 (August 31, 1976).

5. This statute provides in pertinent part:

§ 109. *Repeal of statutes as affecting existing liabilities.*

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in

plicable to the case *sub judice*. Interpreting *Allen v. Grand Central Aircraft Company*, 347 U. S. 535 (1953), this court, in *United States v. State of California*, 504 F.2d 750, 754 (TECA 1974), *cert. denied*, 421 U. S. 1015 (1975), stated:

> [T]he "precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures *to enforce* the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration." 347 U. S. at 554-555, 74 S. Ct. at 756 [emphasis added].

Thus, actions in the nature of pending enforcement proceedings survive the expiration of the ESA; and by the same reasoning, such actions survive the expiration of the FEAA. *Accord, Tasty Baking Company v. Cost*

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force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The Energy Policy and Conservation Act (EPCA), P. L. 94-163, December 22, 1975 amends and extends the EPAA through September 30, 1981; thereafter, the district courts and this court will have continuing jurisdiction over actions within the meaning of the general saving statute, 1 U.S.C. § 109, and the new saving statute, EPAA § 18, as amended by the EPCA. The amended saving statute, EPAA § 18, added by EPCA § 461, explicitly provides:

> [s]uch expiration shall not affect any action, or pending proceedings, administrative, civil, or criminal, not finally determined on such date [September 30, 1981], nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

of Living Council, 529 F.2d 1005, 1009-11 (TECA 1975). Cf. *People of State of California, State Lands Com'n v. Simon*, 504 F.2d 530 (TECA 1974).

The instant subpoena enforcement action was instituted on January 20, 1976, a date when the FEAA was in effect; and it survives as a pending enforcement proceeding initiated prior to the expiration of the FEAA, which act survives any termination by virtue of the saving provision in ESA Section 218. *Tasty Baking Company v. Cost of Living Council*, 529 F.2d at 1010-11.

Second, the President has the power to "delegate all or any portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States . . . as he deems appropriate." EPAA § 5(b). That Presidential authority includes the subpoena enforcement power contained in Section 206 of the ESA. Thus, the congressional grant within the EPAA of power to delegate enabled the President to establish the FEA and to grant its Administrator subpoena enforcement authority identical to that previously given the Administrator of the FEA by the provisions of FEAA Sections 13(e)(1) and 13(e)(2).

Third, the legislative history reflects that Congress intended for the FEA to continue its functions in an uninterrupted fashion. According to the conference committee on the Energy Conservation and Production Act:

> The conferees completed their work on this legislation on July 30, 1976. Because the conference report could not be filed and acted upon by both Houses and presented to the President before the expiration of the Agency, the conferees added language to the bill to make the extension retroactive.

It is the intent of the conferees that this retroactive provision have the effect of permitting the organic Act to continue uninterrupted. *Further, it is the intent of the conferees that the Agency, its functions (including pending regulatory matters),* appointments and other personnel matters, prior obligations and programs, *shall be deemed to have continued uninterrupted despite the brief period between July 30th, 1976 and the effective date of this legislation.*

The conferees are aware that, because of the necessity to continue existing energy programs, the President issued Executive Order No. 11930 on July 30th establishing a Federal Energy Office (FEO) in the Executive Office of the President. The conferees do not intend to suggest that action taken during the hiatus period by the FEO and consonant with the procedures required by the FEA Act would be invalidated by this Act. [Conf. Rep. No. 94-1119, 94th Cong., 2d Sess., p. 68 (1976); emphasis added; U.S. Code Cong. & Ad. News Pamphlet No. 8, p. 3199 at 3216.]

Appellants mistakenly rely upon *Fleming v. Mohawk Wrecking and Lumber Company*, 331 U.S. 111, 91 L.Ed. 1375 (1946). There the Supreme Court held that the President had authority to transfer subpoena enforcement power from the Federal Works Administrator, an officer appointed by the President and confirmed by the Senate, to the Temporary Controls Administrator, a judicial creation of the President. The Court recognized that it would be inconsistent to require "an officer previously confirmed by the Senate" to be "once more confirmed in order to exercise the powers transferred to him by the President." 331 U. S. at 118. The Court considered congressional intent:

> Any doubts on this score would, moreover, be removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Administrator. That recognition was an acceptance or ratification by Congress of the President's action in Executive Order No. 9809. . . . [331 U. S. at 118-119]

The situation in the case before this court is not unlike that in *Fleming*. The President was given specific authority to grant subpoena enforcement power to the Administrator of the FEO, an individual who was confirmed by the Senate, and the Congress ratified his action in enacting the Energy Conservation and Production Act, P. L. 94-385 (August 14, 1976), 2 CCH *Energy Management* ¶ 10,450.

Even if there were any validity to appellants' assertion that the FEA Administrator's authority to enforce the subpoenas did not continue, the appellants overlook the authorization of delegation of subpoena power granted by ESA Section 206 as incorporated by EPAA Section 5(a)(1), which provides in pertinent part:

> § 206. Subpoena power.
>
> The head of an agency exercising authority under this title, or his duly authorized agent, shall have authority, for any purposes related to this title, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents. . . . In case of refusal to obey a subpoena served upon any person under the provisions of this section, the head of the agency authorizing such subpoena, or his delegatee, may request the Attorney General to seek the aid of the district court of the United States for any

district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce documents before the agency.

Clearly, appellees relied upon this section of the statute in their Petition for Enforcement (D. R. at 1), and plainly this is an independent basis for the Administrator's continued exercise of subpoena enforcement authority.

The order of the district court appealed from is AFFIRMED.

 Filed Feb. 4, 1977

APPENDIX D

IN THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

NO. 5-19

THE UNITED STATES OF AMERICA,

Petitioner-Appellant

v.

CAPTAIN W. F. FREDEMAN, PRESIDENT OF PORT ARTHUR TOWING COMPANY AND PALMER MIDSTREAM SERVICES, INC.,

Respondents-Appellees

Appeal from the United States District Court for the Eastern District of Texas

(B-76-261-CA)

ORDER DENYING REHEARING

Before CHRISTENSEN, ESTES and JAMESON, Judges.

The court having duly considered Respondent-Appellees' Petition for Rehearing, and Alternatively, for Modification of the Judgment and Order,

IT IS HEREBY ORDERED that such petition is denied.

February 1, 1977

CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Petition for Writ of Certiorari for Petitioner, Captain W. F. Fredeman, President of Port Arthur Towing Company and Palmer Midstream Services, Inc. were served upon the Solicitor General of the United States and counsel of record for the United States by mailing same this 7th day of March, 1977, as follows:

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